UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Teamsters Local 653, Charging Party	)	
and	)	01-CA-181081 and 01-CA-191349
Liberty Bakery Kitchen, Inc. Respondent	)	

Respondent Liberty Bakery Kitchen, Inc.'s Opposition To The General Counsel's Exception

A. *Levitz* Should Be Overruled Rather Than "Modified" As The GC Advocates

This case and others such as *Scomas of Sausalito, LLC v. NLRB*, 849 F.3d 1147, 1156-57 (D.C.Cir. March 7, 2017), and *NLRB v. B. A. Mullican Lumber and Mfg. Co.*, 535 F.3d 271 (4th Cir. 2008), illustrate the box the Board has put employers in via its *Levitz* decision. Especially given the tremendous restrictions on an employer being able to interview or poll employees under the Act to determine their desires – not the least of which is that since such employee cooperation is voluntary an employer could never be sure its assessment of employee desires was accurate – it is a rare case indeed in which an employer successfully withdrew recognition under the *Levitz* standard.

Under *Johnnie's Poultry*, 146 NLRB 770, 774 (1964), before an employer may interview an employee (which supposedly is just to prepare a defense to a ULP Complaint and not for anything else), an employer must, among other things:

- Employer must obtain employee's voluntary participation
- Questioning must not be coercive
- Context of questions must be free from union animus
- Questions must be relevant to issues in complaint and may not pry into other union matters

- Questions must be factually-based and may not probe employee's subjective state of mind

As to polling employees, there might as well be a Board election for all the good a poll does. The following polling guidelines were set forth in *Struksnes Construction Co.*, 165 NLRB 1062 (1967), and the Board still adheres to these guidelines. *Vista del Sol Health Services, Inc.*, 363 NLRB No. 135 (2016).

1. The purpose of the poll must be to determine whether or not the union enjoys majority support;

2. That purpose is communicated to the employees;

3. Assurances against reprisals must be given to the employees;

4. The employees must be polled by secret ballot; and

5. The employer must not have engaged in unfair labor practices or otherwise created a coercive atmosphere.

Other desirable guidelines include (but are not required): voter eligibility lists; posted election notices; a reasonable period of time between notice and poll for the discussion of issues; and impartial election observers.

While not specifically stated, however, employee participation certainly would have to be voluntary, just like an employee in a Board election does not have to vote. But if both interviewing and polling requires voluntary participation, an employer can rarely be sure that the result accurately reflects employee desires. **Unlike a Board election in which it is a majority of those who vote that determines the result for the group, the *Levitz* standard requires at least 50% of the entire group, not just those willing to participate in a poll or an interview.**

Both procedures are unduly cumbersome and are fraught with danger and the potential for

misperceptions by employees as to what was said or not said in an interview, and have the inherent capacity for unreliability due to their voluntary nature.

Therefore, the Board should return to pre-*Levitz* law, which adequately accommodated both the employees' right to choose, and an employer's ability to dislodge a minority union. In addition to the above discussion, Liberty also relies in this Section on the reasons more eloquently articulated by Member Hurtgen in his *Levitz* concurrence at 333 NLRB 717, 730-733, which Liberty hereby incorporates herein by reference in its entirety.

B. A Simple Alternative Approach That Does Not Punish The Bargaining Unit Members For The Sins Of The Employer

A simple alternative approach would be to retain the current *Levitz* standard, but impose an election as a standard remedy rather than an affirmative bargaining order, unless there is a long history of an evil-doing employer, which is not the case here. In this case, as in *Scomas of Sausalito, LLC v. NLRB*, 849 F.3d 1147, 1156-57 (D.C.Cir. 2017), there was no evidence of anti-union animus at the time of the withdrawal but there was clear evidence of majority disaffection with the union, so an affirmative bargaining order is a terribly harsh remedy that simply does not take into account the actual wishes of the bargaining unit members. The employees in such cases are being punished for the sins of the employer. Here, 9 of 14 bargaining unit members signed a petition that even the ALJ conceded was sufficient support for an RM petition, so why the remedy in this case should be an affirmative bargaining order rather than an election is a mystery to Liberty.

C. The GC Lacks Authority Under The Act To Advocate For A Change In The Law

The Respondent denies that the GC has the statutory authority under Sections 3 and 10 of the Act to advocate for a change in Board law via the alternative legal theory articulated in its

Exception in this Case and in NLRB General Counsel Memorandum GC 16-03, May 09, 2016.

Section 3(d) of the Act, 29 U.S.C. §3, provides in relevant part:

> The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

Section 3 plainly does not provide the GC with the authority or power to advocate with the Board for a change in how the Board construes the Act. It is the Board's responsibility to determine whether or not to impose some change in how it construes the Act. It may be that the GC has taken advocacy positions in the past, but without a statutory grant of authority to do so, such actions are ultra vires and invalid. See, e.g., *State of Nevada et al v. United States Department of Labor*, Civil Action No. 4:16-CV-00731, --- F.Supp.3d ----, 2016 WL 6879615, Memorandum Opinion and Order (E.D. Texas, 11.22.16)(Mazzant, J.)(increase in minimum salary requirement to be exempt under the Fair Labor Standards Act was invalidated as *ultra vires* despite long history of DOL imposing minimum salary standards in addition to duties tests). Put another way, the statutory duties of the GC are administrative and enforcement, not advocacy.

The Supreme Court has decided cases in which an agency has overstepped its bounds and offered an interpretation of a statute that "goes beyond the meaning that the statute can bear" without conducting a *Chevron* analysis. *MCI Telecomm. Corp*., 512 U.S. infra. at 229; see also *Freeman v. Quicken Loans, Inc*., 132 S. Ct. 2034, 2040 (2012) ("We need not resolve that dispute—or address whether, if *Chevron* deference would otherwise apply, it is eliminated by

the policy statement's palpable overreach with regard to price controls.").

If *Chevron* applies, the courts apply a two-step process. The court first determines "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. Second, if Congress has not unambiguously expressed its intent regarding the precise question at issue, then the challenged regulation must at least be based on a "permissible construction of the statute." *Chevron*, 467 U.S. at 843-844.

Here, one must torture Section 3(d) to conclude that the GC has the statutory authority to advocate for changes in the law, rather than simply administer the law as determined by the Board. He can investigate charges and issue complaints – pure enforcement functions - which should be based on Board law as it is, not as the GC wishes it were. This type of advocacy role for a supposedly impartial agency is unseemly at best, and ultra vires at worst. Therefore, the Respondent respectfully requests that the Board reject the GC's advocacy argument and dismiss his Exception in this case.

D. In Any Event, Such A Change Cannot Be Retroactive And Apply To This Case

Even if the Board decides to adopt the GC's approach, such a change cannot be applied retroactively.[1] In *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015), the Board refused to apply a substantive change in its interpretation of the Act retroactively, stating that:

> Having considered these principles, we conclude that finding a violation under a retroactive application of this rule would work a manifest injustice. Today's ruling definitively changes longstanding substantive Board law governing parties' conduct,

[1] Moreover, since such a change cannot be applied retroactively, this argument by the GC is completely irrelevant to this case even if the ALJ is correct on the *Levitz* issue Thus it is patently unfair to require this employer to have to expend its resources to respond to this pure advocacy of the GC.

> rather than merely changing a remedial matter. See *SNE Enterprises*, supra, 344 NLRB at 673; cf. *Kentucky River Medical Center*, 356 NLRB No. 8, slip op. at 5 (2010). Employers relied upon *Bethlehem Steel* for 50 years when considering whether to cease honoring dues-checkoff arrangements following contract expiration. As the Board has done in other cases involving departures from longstanding precedent, we conclude that this reliance interest warrants prospective application only of today's decision.

See also, e.g., *Epilepsy Foundation v. NLRB*, 268 F.3d 1095, 1102-1103 (D.C. App. 2001)(on the employer's petition for review, the D.C. Court of Appeals held that where an employer acted in reliance on clear existing law at the time of its action, the Board could not retroactively apply a change in the law to that employer).

Here, the GC basically argues that only an election can ever justify a union being ousted from a workplace. While that position actually dovetails with the Respondent's argument in its Brief supporting its exceptions as to the remedy in this case (hold an election over an affirmative bargaining order), it would be a revolution in Board law on liability. On the remedy, having an election makes all the sense in the world, for the reasons articulated in the Respondent's Brief in support of its exceptions.

The GC's position in this case actually was the GC's position in *Levitz*, and it was rightly rejected by the Board at that time. 333 NLRB at 717, 719, 725. The mere fact that *Levitz* may have generated a handful of difficult cases (see GC Brief in Support of its Exception at 4-7) is no reason to resort to a more drastic approach with over 50 years of support behind it. There are many caselaw rules of the Board that have generated difficult cases, such as those involving *Weingarten* rights, *Beck* rights, handbooks, social media, the list is seemingly endless. Thus the GC's "Chicken Little" complaint should be rejected.

As discussed in the Respondent's main brief in support of its exceptions at Exception #6, *Levitz* should be overruled (pp. 20-22) and the prior state of the caselaw restored, and at any rate

the remedy for a violation should not reflexively be an affirmative bargaining order (pp. 17-20). Life was easier then for everyone in the labor-management community. As Scotty said in Star Trek III – The Search for Spock, "[t]he more they overthink the plumbing, the easier it is to stop up the drain."

Conclusion

Therefore, Liberty respectfully requests that the Board reject the GC's Exception.

Respectfully submitted,
By the Respondent Liberty Bakery Kitchen, Inc.
By its attorney

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CERTIFICATE OF SERVICE

I, Geoffrey P. Wermuth, hereby certify that on this 17th day of August, 2017, I e-filed a true pdf copy of the foregoing, and served the same via email, on:

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